United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1317

To be argued by
PETER FLEMING JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1317

B P/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

GENE LOY CHU and KUO PING YU,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT GENE LOY CHU

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR DEFENDANT GENE LOY CHU

Preliminary Statement

Defendant Gene Loy Chu appeals from a judgment of conviction entered against him in the United States District Court for the Southern District of New York on July 1, 1976, after trial before the Honorable William C. Conner, United States District Judge, and a jury.

Trial of this case centered upon the marriages of five Chinese male aliens and five United States citizens. It was undisputed that the marriages were entered into with a principal purpose of obtaining permanent residence in the United States for the alien spouses.

It also was undisputed that the marriages were valid as a matter of law.

A foreign national married to an American citizen may apply for and obtain an immigrant visa, and may thereafter be admitted to the United States as a permanent resident regardless of any existing quotas. To obtain the immigrant visa, the American spouse signs and submits a petition to the Immigration and Naturalization Service ("INS") which contains miscellaneous information regarding the marriage and the spouses and, as particularly relevant to this case, a statement as to the place of residence of the married couple. As a matter of policy, INS, upon receiving the petition, conducts an investigation which includes personal interviews of the spouses. The purpose of the investigation is to determine the *bona fides* of the marriage. If approved, the petition is forwarded by INS to the State Department as authority for issuance of the immigrant visa. Permanent status follows (A. 77-79).

The standard INS petition forms are known as I-130 petitions. Copies of the petitions involved in this case are set forth as Exhibits 9B, 16B, 24B, 32B, and 41B (A. 1434-1443). They contain various items of information about the spouses, the marriage, and, as noted, the address in the United States at which the couple had last resided.

Indictment 76 Cr. 439 contained fourteen counts. Chu together with Kuo Ping Yu, known as Jimmy Yu, and Jean Fong were named as defendants.

Count One charged that Chu, Yu, and Fong conspired to defraud the United States, and to file false statements, *i.e.*, the I-130 petitions, with INS.

Counts Two through Seven charged Chu alone with the making of false statements in violation of 18 U.S.C. § 1001. The charge of falsity in each of these counts was identical, namely, that Chu falsely represented that the particular couple involved was residing at a stated address, when, according to the prosecution, Chu knew that the spouses did not live at that address, and indeed never intended to live together at any address.

Counts Eight through Fourteen charged Chu alone with obstruction of justice in violation of 18 U.S.C. § 1505. Again, the charge in each of these counts was identical, namely, that Chu had suborned the spouses to give false testimony during the personal I-130 interviews mentioned above.

Two of the false statements counts (Two and Seven) and two of the obstruction counts (Thirteen and Fourteen) were dismissed by Judge Conner for evidentiary insufficiency.

The testimony was presented in six trial days, after which the jury deliberated over two days before returning its verdict of guilt as to all three defendants. Chu was sentenced on July 1, 1976. He received a six months suspended sentence and was fined a total of $23,000. Fines were imposed on each count with the result that the concurrent sentence doctrine does not apply.

Statement of Facts

The principal prosecution witnesses were five young women and three of their alien spouses. Although the prosecution claimed that each of these witnesses had knowingly participated in a fraud upon the United States, each of them was given immunity (A. 127-128, 207, 305-306, 432-433, 539, 614-615, 724-725, 787-788). The Chinese aliens also were offered varying degrees of assis-

tance with their immigration problems in exchange for their testimony (A. 433-43).

The Chinese male aliens said they were introduced to the defendant Chu, an attorney, for the purpose of an arranged marriage designed to obtain permanent residence. The five young women said they were introduced by Chu to their prospective husbands and agreed to marry in return for $3500 and varied promises of support (A. 186-187, 259, 468, 704-705).

The couples entered into lawful and binding marriages. On the same day, they provided relevant information to Chu and executed blank I-130 INS petitions. The blank petitions subsequently were typed and notarized by Chu with the information provided by the couples on their wedding days.

The false statement counts were based upon the answers given to the question "last address at which couple resided together" (Exhs. 9B, 16B, 24B, 32B, 41B, p. 1). The prosecution said that the statements were false in that the spouses did not live together at the address stated, and never intended to live together at all. Its witnesses supported this claim in large part and testified they told Chu that they did not intend to live together (A. 195-196, 199, 260, 273, 391, 476, 589-590, 598).

The prosecution also proved however that INS did not rely upon the I-130 petitions and, as a matter of uniform policy, investigated and interviewed the participants in all alien marriages in order to determine the *bona fides* of the marital relationship before considering the question of permanent residence for the alien spouse (A. 74, 380-381). The usual interview questioned the spouses about how and where they met, where they lived, and the details of their claimed marital environment. The various

spouses were asked, for example, to describe their residences, the color of their shower curtains, the distance to the bus stop, and other items designed to verify that the spouses in fact were living together (A. 80).

The spouses were interviewed separately. The presence of counsel was allowed, but counsel was forbidden to speak to the spouses between the individual interviews (A. 79-80). The prosecution witnesses testified that Chu prepared them for these I-130 interviews and, knowing that they were not living together, suborned false testimony about the details of their residence and relationship (A. 199-200, 289-290, 407-410, 522-524, 716-717, 775-776).

Chu testified. He said the spouses told him they intended to live together, and denied suborning false testimony in preparation for the I-130 interviews. He said he knew the male aliens were paying the young women up to $3500 as consideration for their agreement to marry, but that this was not unusual in mixed marriages for the purpose of obtaining permanent residence. He said he was present during the actual I-130 interviews and recognized that some answers during those interviews were not true. He said he did not correct these untruths because of his position as counsel. He said however that he subsequently advised his clients that there was no reason to falsify and, on at least one occasion, told the spouses that he no longer believed they were living together (A. 860-870, 872, 884).

While this case at first blush would appear very strong from the prosecution's point of view, in fact it involved a closely contested issue of credibility, as we believe is demonstrated by the length of the jury deliberation in this relatively short trial. It was Chu's word against the testimony of the eight spouse witnesses.

Although we know that the evidence must be viewed most favorably to the prosecution, and do not challenge its

sufficiency for the most part, certain points are required to place the trial errors set forth below in proper perspective. The testimony of the eight immunized prosecution witnesses was impeached to an unusual degree. Numerous prior inconsistent statements under oath were developed. Many of these inconsistencies occurred even after the witnesses' decision to cooperate. And much that was said at the trial on direct examination had never before been said either in signed sworn INS interview statements or in the grand jury. Moreover, at least two of the spouses said on cross-examination that INS had told them that INS wanted "to make" a case on a lawyer (A. 158, 797).

The contradictions and changes in testimony were substantial and not minor. For example, several of the witnesses testified at trial that Chu told them to falsify during their I-130 interviews. Yet in most if not all instances, no such accusation had been levelled in either the earlier sworn statements or the grand jury testimony of these same witnesses (A. 326-330, 332-337, 553-554, 559-560). And one witness, Jout, even testified falsely at the trial concerning undisputed promises made to him by INS with respect to his immigration status (A. 433-440). We believe it may fairly be said that the prosecution witnesses consistently manifested a callous disregard for the truth.

It would be impossible to set forth these extraordinary variances in testimony in brief form. We therefore respectfully direct this Court's attention to the cross-examination of these eight prosecution witnesses (A. 128-160, 208-226, 308-357, 435-455, 539-561, 615-648, 725-749, 789-811).

Our point is that the case was close despite the strong *prima facie* evidence of guilt. In these circumstances, we press five claims.

ARGUMENT

POINT I

A new trial should be ordered by reason of the pollution of the jury and by reason of the court's failure to interrogate each of the jurors individually in the robing room with regard to possible prejudice.

Chu's trial began on May 4, 1976. The jury received the case for determination late in the afternoon on May 13, 1976, and returned a verdict of guilty at approximately 3:45 P.M. on May 17, 1976. The jury did not deliberate over the weekend, May 15-16, 1976.

The length of jury deliberation in this relatively short trial indicates that a close question of credibility existed. That this was the case is further evidenced by the fact that the jury requested the reading of Chu's entire testimony, and returned its verdict within one hour after the conclusion of that reading.

On Saturday, May 8, 1976, during the 6:00 P.M. CBS Television News anchored by the widely-known correspondent Dan Rather, it was reported out of Miami that intermarriages for money had become a national problem facing the Immigration and Naturalization Service. The transcript of that broadcast is contained in the Appendix (A. 1444-1446).

In addition to CBS' Miami correspondent, three other individuals appeared in this segment: a Miami lawyer; an official of the INS in Miami; and an unidentified female who was identified as a prostitute who had married an alien for money in a false marriage intended to obtain residence status for the alien.

The transcript of the broadcast discloses allegations which literally track those on trial in this case. It specifically involved marriage to a citizen for the purpose of obtaining permanent residence. It reported the practice of "paying virtual strangers to marry them, just to get themselves and their family into the United States." It quoted the Miami attorney as stating that the parties to the marriages never lived together, never cohabitated, did nothing together, and then divorced. It spoke of the aliens taking jobs from citizens by working for a lower wage, and collecting welfare and other social service benefits. It discussed "marriage brokers" who receive a fee for finding a citizen to marry an alien.

The INS official who appeared on the program was characterized as a "fraud expert," and was quoted as saying that the "reason we have to ask all of these questions is because people have been buying husbands and wives for the primary purpose of staying here." Indeed, it would appear from the transcript that the INS official is being filmed during one of the I-130 interviews which were a major subject of Chu's case. The official is quoted as saying that "most of the cases . . . are frauds." The unidentified woman represents herself as a prostitute, and is quoted as saying "she married an alien for $500." There is reference to "getting no-fault divorces," another issue raised initially in Chu's trial. The short of the matter is that the program amounted to nothing less than a prejudged visual presentation of the issues of Chu's trial.

The broadcast was brought to the court's attention before the taking of testimony on Monday, May 10, 1976 (A. 484-507). Upon inquiry, it was determined that Juror No. 6 had seen the program and had commented to other jurors about the program when he arrived in the jury room on Monday morning (A. 487-489). Juror No. 6 was questioned in the robing room. He disclaimed

any prejudice. When questioned about what he had told the other jurors, he stated (A. 489):

> "No, I just asked the other jurors this morning if they have seen the television show pertaining to that Miami, Florida situation."

When questioned further, Juror No. 6 stated that he had told the other jurors *nothing* about the substance of the program (A. 489).

The court then questioned Juror No. 8, who had reported that Juror No. 6 had spoken of the broadcast (A. 491-493). Juror No. 8 reported that Juror No. 6 had asked in substance whether "anybody watched the 6:00 news Saturday night. . . . He said it was the exact same case, only it was down in Florida."

Juror No. 8 said that Juror No. 6 had asked this question of approximately ten jurors in the jury room and had added that the program was about intermarriages. Juror No. 8 concluded (A. 492).

> "I don't know if he said exactly the same case, or you know, it was like the same one we were on."

Juror No. 8 then disclaimed any prejudice (A. 493).

Counsel for each of the defendants requested that the court interview each of the jurors individually in the robing room to determine which of the other jurors had heard the comments of Juror No. 6, and whether any had been influenced. This request was refused (A. 492-502). Counsel thereafter moved for a mistrial on the ground that the jury had been polluted (A. 502). The motion for a mistrial was denied. The court instead questioned the jurors as a group in open court. Receiving no response in open court as to prejudicial impact, the court apparently considered the issue resolved and the trial continued (A. 504-506).

The motion for a mistrial should have been granted. The transcript of the televised news spot speaks for itself on the issue of prejudice. Even the prosecution recognized its prejudicial nature with its candid statement "that perhaps there may be prejudice on the part of Mr. Agoney"—the juror who actually saw the broadcast (A. 495).

Agoney's discharge would not have solved the problem however, and in fact would have increased the potential for prejudice. Agoney had mentioned the broadcast to "about" ten jurors, and the natural jury reaction to his discharge would have been to speculate as to how precisely prejudicial the broadcast must have been. As counsel stated, the discharge of Agoney "will heighten the speculation that what he heard was adverse to these defendants." (A. 502). Defense counsel were placed in a dilemma which could not be solved. They had either to retain the juror who had seen the broadcast or expose their clients to adverse speculation by the other jurors. A mistrial was the only certain remedy.

At the very least the Agoney situation required individual interrogation of the other jurors. Individual inquiries could have focused upon the impact on each juror of what Agoney had already said, could have determined more precisely what Agoney in fact did say (there was dispute on this point), and could also have inquired as to the possible adverse prejudicial reaction to a discharge of Agoney.

Certainly, had the incident occurred prior to the selection of the jury, a robing room examination of any juror exposed to the broadcast would have been required. Section 3.4(a) of the ABA's Standards Relating to Fair Trial and Free Press (1968) provides:

> "Whenever there is believed to be a significant possibility that individual talesmen will be in-

> eligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure *shall* take place outside the presence of other chosen and prospective jurors." (emphasis added)

The ABA Standard has been adopted in this and other circuits. *United States* v. *Colabella*, 448 F.2d 1299, 1303, n.5 (2d Cir. 1971), *cert. denied*, 405 U.S. 929 (1972); *United States* v. *Liddy*, 509 F.2d 428, 435 (D.C. Cir. 1974); *United States* v. *Addonizio*, 451 F.2d 49, 67 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972); *Patriarca* v. *United States*, 402 F.2d 314, 318 (1st Cir. 1968), *cert. denied*, 393 U.S. 1022, *rehearing denied*, 393 U.S. 1124 (1969); *Silverthorne* v. *United States*, 400 F.2d 627, 639-640 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971).

This standard is based upon the accepted realization that a truthful admission of prejudice is far more likely during isolated individual questioning than in group open-court interrogation. *United States* v. *Colabella*, *supra*; *United States* v. *Accardo*, 298 F.2d 133 (7th Cir. 1962); *Coppedge* v. *United States*, 272 F.2d 504 (D.C. Cir. 1959), *cert. denied*, 368 U.S. 855 (1961).

In *Colabella*, negative prejudgment was expressed by various jurors during the open-court jury selection *voir dire*. This Court refused to reverse on the record of that case, *but specifically noted that the matter did not involve prejudicial publicity*, and then stated, 448 F.2d at 1303:

> "Having disposed of the case before us on the merits, we believe it might be of some aid to district judges, if we noted that there may be circumstances when it would be better practice for the judge to question each prospective juror out of the presence of other prospective jurors, but, of course, in the presence of counsel and the defendant."

The Court cited the ABA Standard set forth above, the *Coppedge* case, and specifically the language in *Coppedge*, 448 F.2d at 1304:

> "It is too much to expect of human nature that a juror would volunteer, in open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial."

The Court in Colabella then concluded, 448 F.2d at 1304:

> "But when there is any foundation for concern about juror partiality, partiality of the sort which, if expressed, might affect other prospective jurors, the demands of the 'most priceless' safeguard of individual liberty—the right to trial by an impartial jury—justify the small expense of time required by the guidelines suggested above."

The need for individual interrogation of the jurors was clear in this case. The week-end publicity was devastating. The television segment virtually tracked the allegations against Chu. An INS official appeared on the broadcast, identified as a "fraud expert," and was quoted as stating that most of her 100 cases per month "are frauds."

The questioning of Juror No. 8 [Lynch] was not sufficient. Indeed, it increased the need for individual questioning of the other jurors, since Lynch disagreed with Agoney as to what Agoney had said. These jurors said:

Agoney: "No, I just asked the other jurors this morning if they have seen the television show pertaining to that Miami, Florida situation." (A. 489).

Lynch: "When he came into the jury room he said 'anybody watch the 6 o'clock news Saturday night,' and I don't think anybody had

> watched it except him, and he said it was the exact same case, only it was down in Florida. That's all he said." (A. 491).

We believe in fact that even individual interrogation of all the jurors could not have cured the problem. At the very least, however, it should have been tried.

POINT II

A hearing should have been ordered on the question of government responsibility for the prejudicial televised news spot.

During the colloquy on the weekend publicity, defense counsel expressly reserved the right to request an evidentiary hearing on the question of government responsibility for the televised news spot (A. 504-505). A post-trial hearing was requested and denied. A hearing should have been granted.

Chu was arraigned on January 12, 1976. Trial for the week of May 3, 1976 was fixed on January 23, 1976. Even ignoring the obvious prejudice of the broadcast in itself, a new trial surely is required if the government knew or had reason to know with due diligence that the broadcast would play in New York during Chu's trial. Government responsibility for prejudicial publicity clearly is a material consideration in matters such as this. See, *e.g.*, *United States* v. *Sweig*, 316 F. Supp. 1148, 1154 (S.D.N.Y. 1970); *United States* v. *Cohn*, 230 F. Supp. 587, 589 (S.D.N.Y. 1964).

Clearly the facts in this case were sufficient to raise a question of responsibility on the government's part. INS

is a division of the partment of Justice. If INS deemed it appropriate to submit to a televised interview, apparently for the purpose of publicizing what it considered a national problem, then the responsibility for any resulting real or potential prejudice must rest in substantial part with our government as a whole.

On the face of the transcript moreover, it would appear that the broadcast in question resulted from more than the initiative of a private network or one of its reporters. Indeed the inference of government initiative may be drawn from the fact that an INS official was televised, apparently during an I-130 interview, and was quoted freely throughout the segment.

The television appearance by an INS official was improper, especially in view of the fact that a series of prosecutions like *Chu* have been initiated in the past year, apparently as the result of the considered judgment of INS that intensive enforcement efforts were required. Chu's case aside, it was improper for the government to leverage its general enforcement efforts by such devastating extrajudicial declarations.

Among the questions appropriate for evidentiary hearing were:

(a) Did the CBS report result from INS suggestion?

(b) If so, was the suggestion coordinated and connected with INS intensification of enforcement in this area of its responsibility?

(c) Who authorized the INS official to give a televised interview and when?

(d) Who, if anyone, authorized the statements made during that interview, including statements which were not actually broadcast?

(e) Did INS know the timing of the actual broadcast?

(f) Did INS know that the broadcast would play while the trial of indictments on the issue were pending?

(g) If INS knew when the broadcast would play, did it know that the date of broadcast would fall within Chu's trial?

(h) Did INS take any steps to assure that the broadcast would not play during Chu's trial or any other trial?

The absence of knowledge or responsibility on the part of the United States Attorney in this District is immaterial. The government is *one* government, and all of its members are responsible for conduct of other members which creates real or potential prejudice. See, *e.g.*, *Giglio* v. *United States*, 405 U.S. 150, 154 (1971); *Delaney* v. *United States*, 199 F.2d 107, 114 (1st Cir. 1952).

In the *Delaney* case, the United States Attorney was held to be bound—as a part of our one government—by the effect of publicity generated by Congressional hearings. In *Giglio*, a prosecution witness misrepresented the absence of promises in return for his testimony. The trial prosecutor did *not* know of the promises, which had been made by another Assistant. The Supreme Court nonetheless reversed the conviction. It said, 405 U.S. at 154:

> "A promise made by one attorney must be attributed, for these purposes, to the Government."

At the least, this case should be remanded for an evidentiary hearing on possible government culpability in this regard.

POINT III

The evidence on the false statement counts did not warrant or support a charge on recklessness.

The prosecution's witnesses testified that Chu was told the marriages were sham and that the couples would not be living together at the addresses set forth on the form. Their testimony was based on alleged specific conversations with Chu which, if believed, demonstrated full knowledge on Chu's part of the sham nature of the marriages in question. Chu admitted discussing the spouses' intentions but insisted they had told him they intended to live together as husband and wife (A. 860-870). This therefore was not a case like *United States* v. *Sarantos*, 455 F.2d 877 (2d Cir. 1972), where a recklessness instruction was approved in circumstances in which, as this Court specifically noted, the prosecution failed to show that the defendant ever was explicitly told that the couples did not intend to live together. Nor was this a case where the prosecution ever claimed or offered proof that Chu consciously closed his eyes to what was plain to see. Its witnesses said Chu had been told the truth, and the prosecutor argued that Chu had been told the truth. Chu denied it. The only issue, as the trial judge himself recognized, was whom to believe (A. 1357).

Nevertheless, at the prosecutor's request and over defense objection, the court instructed the jury that the element of knowledge could be established alternatively upon a finding of recklessness on Chu's part (A. 1349). The result was to open the unacceptable possibility that the jury could disbelieve the prosecution's own witnesses, reject the prosecutor's own summation, and nevertheless convict Chu.

Jury instructions necessarily must be confined to the issues in the particular case as developed by the evidence. See, *e.g.*, *Ryan* v. *United States*, 314 F.2d 306, 311 (10th Cir. 1963); *Sims* v. *Texas and New Orleans R.R.*, 267 F.2d 37, 38 (5th Cir.), *cert. denied*, 361 U.S. 888 (1959); *Reistroffer* v. *United States*, 258 F.2d 379, 392 (8th Cir. 1958), *cert. denied*, 358 U.S. 927 (1959). The purpose is to avoid confusing a jury which otherwise could indulge in conjecture and speculation rather than its true function of weighing the evidence against the issues as framed at trial. *United States* v. *Breitling*, 61 U.S. (20 How.) 252 (1857).

In *Breitling*, the trial judge assumed facts in his charge which had not been evidenced at trial. In reversing on this ground, the Supreme Court stated on pp. 254-255:

> "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

See also *Morris* v. *United States*, 326 F.2d 192, 195 (9th Cir. 1963).

Where a false issue has been inserted into a case sufficient to divert the jury from a proper consideration of the actual issues at hand, a conviction so based cannot stand. *Michaud* v. *United States*, 350 F.2d 131, 133-

134 (10th Cir. 1965). The instruction on recklessness unquestionably interjected an issue which could only have confused and misled the jury. As the Fifth Circuit stated in *United States* v. *Hill*, 417 F.2d 279, 281 (5th Cir. 1969):

> "Extraneous *law* may be quite as prejudicial as extraneous *facts*. Verdicts should be based only on the evidence in the case and the pertinent law as applied to that evidence."

Chu was entitled to a determination of his guilt or innocence based upon the case as it was presented and argued by the prosecution. The requested instruction on recklessness in effect constituted a second-line and never argued theory of wrongdoing. Given the length of the jury deliberation in this short trial, the possibility of compromise on the issue of credibility is clear, and the prejudice of the recklessness instruction is apparent.

POINT IV

The evidence was insufficient to prove the single conspiracy charged in Count One and that count should therefore have been dismissed.

Count One charged a single conspiracy between Fong, Chu, and Yu to defraud the United States and to file false statements with the INS. The prosecution, in its bill of particulars, claimed that the alien and citizen spouses were also members of that conspiracy. However, the evidence at trial failed to establish that the individual spouses had sufficient connection with each other and with the three defendants to warrant a finding that they were members of the single conspiracy charged. See *Kotteakos* v. *United States*, 328 U.S. 750 (1946);

see also *United States* v. *Branker*, 418 F.2d 378 (2d Cir. 1969). At best, the evidence showed that each alien seeking permanent residence and each citizen spouse were brought to Chu by either Fong or Yu. They thus clearly were unconnected "spoke conspirators" of the type involved in both *Branker* and *Kotteakos*, *supra*, and could not constitute the continuing "core" of conspirators essential to establish the existence of the single conspiracy charged. *United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1964).

It follows that unless Chu and or Fong and Yu were shown to be members of the conspiracy charged in Count One, that count should have been dismissed. Since the evidence was insufficient to establish such participation by Fong or Yu, Chu was entitled to an acquittal and a dismissal on that count. *United States* v. *Williams*, 503 F.2d 50, 54 (6th Cir. 1974); *United States* v. *Fox*, 130 F.2d 56, 57 (3d Cir.), *cert. denied*, 317 U.S. 666 (1942).

A conspiracy to defraud requires a specific intent to do so, which in turn requires proof that the conspirators *knew* and *agreed* that the United States was to be defrauded. As the Supreme Court stated in *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711 (1943):

> "Without the knowledge, the intent cannot exist. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal." (citations omitted)

See also *Ingram* v. *United States*, 360 U.S. 672 (1959); *cf. Bufalino* v. *United States*, 285 F.2d 408 (2d Cir. 1960). In this case knowledge that the United States was to be defrauded required proof that each alleged core conspirator, Chu, Yu, and Fong, was aware that under the immigration laws a marriage valid under

the laws of the State of New York was not sufficient in itself to qualify an alien for permanent residence. Put another way, it was incumbent upon the prosecutor to establish that Yu, Fong, and Chu were aware that it was essential that the marrying parties intend to share a life together as husband and wife. See *United States* v. *Diogo*, 320 F.2d 898 (2d Cir. 1963).

Chu was a lawyer who clearly was aware of this requirement, and so testified (A. 856-862). However, there was no sufficient evidence of such knowledge as to either Yu or Fong. There was likewise no proof that Yu and Fong were present at any of the alleged sessions among Chu and the spouses wherein Chu allegedly suborned false testimony for the INS interviews.

Furthermore, with respect to the second alleged object of the conspiracy, the filing of false statements with the INS, there was no proof that either Fong or Yu was aware that false statements had to be filed. The prosecutor claimed that the I-130 petitions were false in that they misstated the marital residence of the spouses. Yet there was no proof that Fong or Yu knew that misstatements as to residence were being made or even had to be made. This case is therefore very similar to *United States* v. *Ausmeier*, 152 F.2d 349, 356 (2d Cir. 1945), where the Court stated:

> "As the substantive crime [the filing of knowingly false statements] thus involved both (a) falsity and (b) knowledge of the falsity, the defendants were obviously entitled to have the judge charge, in the most unmistakable language, that no defendant here could be found guilty [of conspiracy] unless he was party to an agreement, *plan or* combination, to file an application containing statements known to him to be false. *The existence of*

> *a common undertaking, in which a defendant joined, merely to file statements which were false, but not known to him to be false, could not support his conviction.*" (emphasis added)

It follows that since Chu could not conspire with himself, and since Yu and Fong were not shown to have sufficient knowledge to permit an inference that they *agreed* to defraud the United States or to file false statements with the INS, the conviction must be reversed on the conspiracy count and that count dismissed.

It is clear also that a factual deficiency as to either alleged object of the conspiracy requires at the very least a reversal on Count One. The jury was instructed that it was not required that they find that both objects of the conspiracy were proved so long as they found that a conspiracy to commit one was established (A. 1335, 1402, 1404-1405). We can only speculate as to which object the jury found was proved. A reversal is therefore required if the evidence was insufficient with regard to knowledge of any one of the two objects alleged. *Grunewald* v. *United States*, 353 U.S. 391 (1957); *Bollenbach* v. *United States*, 326 U.S. 607 (1946).

POINT V

The trial court erred in failing to instruct the jury, as requested, with respect to the attorney-client relationship.

The prosecution proved that Chu was present at certain INS interviews at which the spouses made false statements which related in part to how and when and under what circumstances they had met (A. 121-122, 201-204, 288-289, 413-414, 526-528, 720-722, 780-782). Since the spouses had actually either met at Chu's office or had

been introduced through Chu, it was clear that Chu knew these statements were false. The prosecution further proved that Chu did not correct these statements durin or after the interviews. Chu testified that with respect to these situations, while he was aware that untruthful statements were being made, he could not and did not correct those statements because he believed that he could not do so without violating his attorney-client relationship with the spouses (A. 884).

The impact of the prosecution's proof was, of course, unquestionably significant and substantial, and the prosecution made much of it in summation (A. 1185, 1194, 1205, 1208). It was therefore essential to Chu's defense that the jury be instructed with respect to an attorney's obligation to maintain the confidences of his client. Therefore, the defense requested the court to instruct the jury either (a) that the attorney-client relationship, as a matter of law, precluded Chu's disclosure to the INS that his clients had testified falsely and that no adverse inferences could be drawn against him because of his non-disclosure or (b) that if the jury found that in good faith Chu believed that the attorney-client privilege forbade such disclosure, then the jury could draw no adverse inferences from his silence. The trial judge denied both requests (A. 1130-1137).

We submit most respectfully that both charges were correct and that at least one of them should have been given. The attorney-client relationship between Chu and the spouses was clearly established. It was also clear that Chu only knew that the spouses testified falsely because of information learned as a result of that attorney-client relationship. And even if the court was not satisfied that as a matter of law the attorney-client privilege precluded disclosure, at the very least the jury should have been told that no adverse inference could or should be drawn against Chu from his silence if Chu, in good faith, believed that he could not make such disclosure.

The prejudicial effect of proof establishing silence by an attorney in the face of knowing falsehoods being uttered in his presence is enormous. It therefore was essential that the jury be given definitive and specific guidelines as to what inferences should be drawn from that silence in view of Chu's unique status as an attorney. Under these circumstances, the failure of the court to provide that assistance severely prejudiced Chu's defense and requires a reversal of his conviction.*

CONCLUSION

The judgment of conviction should be reversed. Count One should be dismissed.

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Respectfully submitted,

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The prejudice that resulted from the court's refusal to instruct as requested was not in any way cured by the court's instruction, in discussing the elements of the crime charged, that mere silence was not enough to establish those crimes (A. 1342). Telling the jury what is or is not a crime has nothing to do with what inferences should or should not be drawn from the evidence.

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